IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GEOFFREY ALAN HAUPTLI, Appellant.	No. 31656-1-II UNPUBLISHED OPINION

QUINN-BRINTNALL, C.J. — Following trial for second degree intentional murder, the jury convicted Geoffrey Hauptli of the lesser included offense of first degree manslaughter. Hauptli appeals, contending that the trial court erred by refusing to also instruct the jury on the lesser included offense of second degree manslaughter. We agree and reverse and remand for a new trial.

FACTS

Hauptli was charged with one count of second degree intentional murder[1] for the beating

[1] Former RCW 9A.32.050 (1975-76) states:

> (1) A person is guilty of murder in the second degree when:
>
> (a) With intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person; or
>
> (b) He commits or attempts to commit any felony, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in

death of Clarence Johnson.[2] At trial, both the defense and the prosecution submitted proposed jury instructions. Discussion of the instructions occurred off the record. But the trial court allowed the parties to supplement the record on review with a narrative or agreed report of proceedings of the instructions conference. The supplemental information reveals that during this instructions discussion, Hauptli's counsel urged the trial court to instruct the jury on the lesser included offense of second degree manslaughter as well as first degree manslaughter. Formal exceptions to jury instructions were taken on the record. But at that time, Hauptli's counsel did not formally except to the court's refusal to include a second degree manslaughter instruction. The jury found Hauptli not guilty of second degree intentional murder but convicted him of the lesser included offense of first degree manslaughter.

Hauptli filed a motion for a new trial in which he argued that the trial court had improperly refused to give the jury the second degree manslaughter instruction. The trial court denied this new trial motion and Hauptli appeals.

> the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:
>
> (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
>
> (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
>
> (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
>
> (iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.
>
> (2) Murder in the second degree is a class A felony.

[2] The victim's last name is spelled two ways in the record: "Johnson" and "Johnston." This opinion will use "Johnson."

ANALYSIS

Hauplti maintains that the trial court was required to instruct the jury on the lesser included offense of second degree manslaughter. Under RCW 10.61.006, a defendant is entitled to an instruction on a lesser included offense when two conditions are met: First, under the legal prong, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, under the factual prong, the evidence in the case must support an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). As a matter of law, first and second degree manslaughter are lesser included offenses of second degree intentional murder. *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997). Thus, we address the factual prong and whether the evidence before the trial court supported an inference that only the lesser crime was committed.

To determine the sufficiency of the factual prong, a court cannot weigh the evidence but must view all the evidence in the light most favorable to the defendant. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 460-61, 6 P.3d 1150 (2000). The defendant must show that the evidence, when viewed in this favorable light, raises an inference that only the lesser included offense was committed to the exclusion of the greater offense. *Fernandez-Medina*, 141 Wn.2d at 455-56.

Evidence supporting the giving of a lesser included offense instruction can come from the defense, the prosecution, or a mixture of both. *Fernandez-Medina*, 141 Wn.2d at 456. The evidence must be sufficient to "permit a jury to rationally find a defendant guilty of the lesser offense and acquit of the greater." *Fernandez-Medina*, 141 Wn.2d at 456. This means that the "evidence must affirmatively establish the defendant's theory of the case—it is not enough that the

jury might disbelieve the evidence pointing to guilt." *Fernandez-Medina*, 141 Wn.2d at 456.

Waiver

Citing CrR 6.15, the State asserts that Hauptli has not preserved this challenge for our review because he did not properly except on the record to the trial court's refusal to give the second degree manslaughter instruction. It contends that the supplemental summary of proceedings is insufficient to cure this deficiency.

CrR 6.15(c) requires that the party objecting to the trial court's refusal to give a requested instruction must "state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused." The purpose of CrR 6.15(c) is to give the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Failing to properly object at trial waives the issue for appeal absent manifest constitutional error. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Because the failure to instruct on lesser included offenses is not an error of constitutional magnitude, we will not review this issue where there has not been an appropriate objection below. *State v. Lord*, 117 Wn.2d 829, 880, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). But our Supreme Court has explained that an exception is sufficient when "an exception is taken in such a fashion that the purpose of the rule requiring specificity is satisfied, *i.e.*, so that the trial court is informed of the alleged error, thereby affording it the opportunity to rectify any possible mistakes without the necessity and expense of appeal." *State v. Gosby*, 85 Wn.2d 758, 763, 539 P.2d 680 (1975).

Our review of the supplemented record, together with the trial court's oral ruling denying Hauptli's motion for a new trial, clearly suggests that the defense requested the second degree manslaughter instruction and that the court declined to give it for the same reasons that it denied

the motion for a new trial.[3] Thus, the record reveals that the trial court was informed of the nature of the alleged error sufficient to give it an opportunity to correct any error. Therefore, this issue is sufficiently preserved for our review.

Failure to Instruct on Second Degree Manslaughter

We review de novo the trial court's denial of a request for a jury instruction on a lesser included offense on the basis of the legal prong. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). We review a trial court's refusal to give a requested instruction, when based on the facts of the case, for an abuse of discretion. *Walker*, 136 Wn.2d at 771-72. A trial court abuses its discretion if it bases its decision on an erroneous view of the law or applies an improper legal standard. *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

In addressing a challenge to the trial court's failure to give a lesser included offense instruction, we review the evidence in the light most favorable to Hauptli, the proponent of the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56. In this light, the record reveals the following:

Hauptli and his roommate, Danny Higgins, went to a party on the evening of November 30, 2002. Hauptli had not slept well for three days.[4] At the party, Hauptli drank a liter of Seagram Seven Whiskey. Around 1:00 a.m., Hauptli and Higgins decided to find another party.

While driving around looking for a party, Hauptli got out of the car and tried to catch up

[3] The trial court denied Hauptli's motion for a new trial because it found that there was no evidence that either Hauptli or Higgins was not aware of the risk that the victim would die but should have been.

[4] Higgins suffered a concussion two weeks before the incident. This required that Hauptli care for him by waking him up throughout the night.

to a girl on a nearby sidewalk. As Hauptli approached, he realized the person was a man.

Hauptli said, "[Y]ou're no female," and the man, Johnson, responded, "Fuck you. I know this." 9 RP at 85. Johnson also stated, "[G]et the 'F' out of my neighborhood, punk." 9 RP at 85. Johnson grabbed Hauptli by the jacket and stabbed him in the leg with a knife.

Hauptli hit Johnson, and the two men ended up on the ground wrestling around and fighting each other. Johnson had control of the knife and was pressing it into Hauptli's leg. Hauptli hit Johnson with his fists, trying to get him to let go of the knife. When these efforts failed, Hauptli pulled out the gun he kept in his waistband and hit Johnson with it. Because Johnson was still trying to advance toward him, Hauptli hit Johnson "square in the [right side of the] head." 9 RP at 90. Johnson then dropped the knife.

Johnson and Hauptli kept struggling, with Hauptli simultaneously trying to keep the knife away from Johnson. Eventually Hauptli grabbed the knife, "jerked" Johnson forward, and stabbed him twice. 9 RP at 90. Johnson "arced up," grabbed Hauptli, hit him one time, and they both fell back onto the ground. 9 RP at 91.

Hauptli and Johnson continued to fight on the ground. Hauptli repeatedly hit Johnson with the gun because Johnson wouldn't stop lunging at him and Hauptli thought Johnson was trying to kill him. Hauptli would hit Johnson, lie back down, and then Johnson would get on top of him again. Hauptli testified: "I was in fear for my life. [Johnson] had already stabbed me once. . . . [I believed if he got a hold of the knife] he would use it again repeatedly." 9 RP at 104-05.

As Hauptli tried to back up, he saw Higgins come up to Johnson, cock and put a gun to Johnson's head. Hauptli told Higgins not to shoot. Higgins released the safety and hit Johnson at least twice to the back of the head with the gun.

Higgins hit Johnson several more times (at least eight) with the gun, "bringing it down on him" in a "whipping motion." 9 RP at 93. Johnson fell to his knees upright while Higgins was hitting him. Higgins stopped hitting Johnson with the gun when Johnson went down on his hands to all fours. Higgins grabbed Hauptli, and the two men went back to the car. Hauptli was "screaming that [he] was stabbed." 9 RP at 95.

Higgins's testimony was substantially the same as Hauptli's. According to Higgins, after Hauptli approached the person they thought was a girl, the next thing he saw was the two "rolling around on the ground [fighting]." 10 RP at 43. They were both "fighting, throwing all kinds of blows, wild, crazy." 10 RP at 44. Hauptli was yelling that he had been stabbed and was defending himself by hitting Johnson in the head and chest with his handgun.

Higgins saw that there was "blood everywhere," but could not see the wound. 10 RP at 44. Higgins grabbed his own gun and "struck the man a couple of times, twice, maybe three times [from above Johnson down onto the back of his head with all of his might], until [he] could get [Hauptli] from under the man." 10 RP at 45. After these blows, Johnson did not move anymore; he was on his hands and knees facing the ground. Higgins helped Hauptli back to the car. When asked why he hit Johnson, Higgins responded: "My friend was in a fight, and he was yelling that he got stabbed. I'm freaking out, and he's freaking out. Automatically, in my head, I had to help my friend." 10 RP at 45.

Pak Gladowski, an eye witness, testified that around 3:00 a.m. he saw two men "swinging, punching somebody on the ground." RP (Jan. 27, 2004) at 15. He described Johnson as being in a fetal-like position and being pistol-whipped by one of the men while the shorter man was yelling that he had been stabbed and was not getting up. Theresa Cordova, an eye witness, also similarly

described the beating.[5]

Johnson died from multiple blunt injuries to the head and stab wounds in the back.

A person commits first degree manslaughter when he or she "recklessly causes the death of another person." RCW 9A.32.060(1)(a). "A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation." RCW 9A.08.010(1)(c). By giving the first degree manslaughter instruction, the trial court necessarily found that the evidence presented allowed the jury to find that Johnson's death was the result of Hauptli's reckless, but not intentional, conduct.

A person commits "manslaughter in the second degree when, with criminal negligence, he causes the death of another person." RCW 9A.32.070(1).

> A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.08.010(1)(d).

[5] But Cordova also testified that Johnson originally was in the car with Hauptli and Higgins. This portion of Cordova's testimony was not consistent with the other trial testimony.

Under current Washington law, a defendant who establishes that he acted negligently or recklessly in otherwise reasonably repelling an attack is entitled to have the jury consider whether he may be guilty of the lesser included charge of manslaughter rather than murder.[6]

State v. Schaffer, 135 Wn.2d 355, 358, 957 P.2d 214 (1998). *Schaffer* controls our decision here.

In *Schaffer*, Schaffer was charged with first degree premeditated murder for the shooting death of Magee. Schaffer testified that as they left a club, Magee shook his fist, swore, and threatened to kill him. When Magee moved his arm toward his back, Schaffer thought Magee was reaching for a gun. Schaffer drew his gun and fired several shots, killing Magee. *Schaffer*, 135 Wn.2d at 357. The trial court denied Schaffer's request for a manslaughter jury instruction. *Schaffer*, 135 Wn.2d at 357. In reversing Schaffer's conviction, our Supreme Court held, "[A] defendant who reasonably believes he is in imminent danger and needs to act in self-defense, 'but *recklessly* or *negligently* used more force than was necessary to repel the attack,' is entitled to an instruction on manslaughter." *Schaffer*, 135 Wn.2d at 358 (emphasis added) (quoting *State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981)). The *Schaffer* court found that evidence of the defendant's upbringing and circumstances of the event—shooting Magee five times, two in the back—supported the claim that he "recklessly or negligently used excessive force to repel the

[6] This rule should not to be confused with the doctrine of imperfect self-dense that our Supreme Court rejected in *State v. Hughes*, 106 Wn.2d 176, 188-91, 721 P.2d 902 (1986). The doctrine of imperfect self-defense acts to lessen criminal culpability by permitting an inference that use of force is not done with unlawful intent to kill when someone acts in self-defense with an honest but *unreasonable belief that self-defense is necessary*. *Hughes*, 106 Wn.2d at 188. This is different than the situation addressed in *Schaffer*. In order for *Schaffer* to apply, the defendant's belief in the necessity to use some force in self-defense must be reasonable. 135 Wn.2d at 358. *Schaffer* applies where the necessity to initially use force is reasonable but amount of force used is arguably unreasonable. 135 Wn.2d at 358

danger he perceived." 135 Wn.2d at 358.

Hauptli maintains that his acts were arguably criminally negligent and not reckless either because at some point during the altercation, in the heat of fighting, he failed to be aware that the amount of force he used was unnecessary since Johnson no longer posed a threat; or, alternatively, that his state of intoxication and sleep deprivation caused him to be unaware of the prudent amount of force required.[7] The State argues that Hauptli failed to provide sufficient evidence of criminal negligence not amounting to recklessness as would be necessary to support the giving of such an instruction.

Here, Hauptli's testimony supports an argument that he was criminally negligent, rather than reckless, for disregarding or being unaware of the appropriate amount of force needed to repel Johnson's attack. Examining Hauptli's actions in the light most favorable to him, the jury could have believed that, faced with a knife attack, Hauptli initially was justified in using force against Johnson but that at some point during the altercation, he exceeded the scope of lawful self-defense and when he exceeded this lawful scope, his actions were criminally negligent but not reckless. So, even though Hauptli's actions were disproportionate to the threat, these acts could have recklessly *or* negligently caused Johnson's death. Thus, according to the rule in *Schaffer*, Hauptli was entitled to have the jury consider whether his actions were only criminally negligent rather than reckless.

[7] Additionally, Hauptli points out that the prosecutor's closing argument supports his claim that his use of force was initially justified and only later became a criminally negligent excessive use of force. Hauptli acknowledges that the statements of the prosecutor are not evidence. But taken in the light most favorable to him, they demonstrate how the jury could have properly drawn an inference of criminal negligence from the testimony and evidence he presented at trial. 11 RP at 46-47.

On the record before us, Hauptli presented sufficient evidence to support the giving of a lesser included offense instruction of second degree manslaughter. Therefore, we reverse and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

BRIDGEWATER, J.

HUNT, J.